UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

ENERGY AUTOMATION SYSTEMS, INC.,	)	
	)	
Plaintiff,	)	Case No. 3:06-1079
	)	
v.	)	Judge Trauger
	)	
XCENTRIC VENTURES, LLC, *ET AL.*,	)	Magistrate Judge Griffin
	)	
Defendants.	)	

DEFENDANT XCENTRIC VENTURES, L.L.C.'S RESPONSE TO PLAINTIFF'S MOTION TO LIFT STAY ON DISCOVERY FOR LIMITED PURPOSE OF DISCOVERING JURISDICTIONAL FACTS

Defendant XCENTRIC VENTURES, L.L.C. ("Xcentric") respectfully submits the following Response to Plaintiff ENERGY AUTOMATION SYSTEMS, INC.'s ("EASI") Motion (Doc. #24) to Lift Stay on Discovery. As explained below, Plaintiff's motion fails to establish any need for additional discovery at this time. For that reason, Plaintiff's motion should be denied.

I. INTRODUCTION

On March 26, 2007, Defendant Xcentric filed a Motion to Dismiss (Doc. #17) for Lack of Personal Jurisdiction. The argument presented in that motion was extremely simple and requires no vetting of the facts. The Court cannot determine that Xcentric either committed a tort in or directed a tort at Tennessee because, in order to do so, it would have to treat Xcentric either as an author of content or as a publisher of content provided by a third party. The Communications

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Decency Act, 47 U.S.C. § 230(c)(1) (the "CDA") prohibits Xcentric from being treated as an author or publisher under these uncontested facts.

As explained in the Motion to Dismiss, before this case was commenced, Xcentric received an email from the President of EASI, Joseph Merlo, which described Mr. Merlo's knowledge of the identity of the person (an unknown third party) who created the alleged defamatory statements at issue in this case. As he stated in his email, Mr. Merlo was clearly aware of the identity of the actual author of these statements; "During pre-trial discovery [in another case unrelated to this one] we learned that virtually all the negative postings on Ripoffreport were made by ONE man."

EASI's claims in this case are based on statements which EASI knows and admits were authored by a third-party, not by Xcentric. In addition, as set forth in the Motion to Dismiss, the titles of the posts were authored by the same person who authored the postings, and no agent of Xcentric added any content to the postings.

Now, in light of this posture, EASI claims that it requires additional discovery relating to the question of jurisdiction. In its motion, EASI fails to describe what information it seeks. As explained above, however, the only question is whether Xcentric authored any content about EASI. It is undisputed that it did not.

II. ARGUMENT

Citing *Theunissen v. Matthews*, 935 F.2d 1454 (6th Cir. 1991), EASI argues that the Court has two options: 1.) decide the motion on the current record; or 2.) decide the motion following discovery. This argument is incorrect. Rather, *Theunissen* explains that:

> Presented with a properly supported 12(b)(2) motion and opposition, the court has three procedural alternatives: it may decide the motion upon the affidavits alone; it may permit discovery in aid of deciding the motion; or it may conduct an evidentiary hearing to resolve any apparent factual questions.

Theunissen v. Matthews, 935 F.2d at 1458 (emphasis added) (citing *Serras v. First Tennessee Bank Nat. Ass'n.*, 875 F.2d 1212, 1214 (6th Cir. 1989)).

Theunissen also recognized that the burden of initially establishing jurisdiction rests with the plaintiff, and furthermore, "in the face of a properly supported motion for dismissal, the plaintiff may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction." *Id*. (emphasis added). With these standards in mind, the Court has discretion to select the appropriate method for resolving jurisdictional disputes, *assuming* each side has submitted conflicting affidavits. *See id.* This has not yet happened in this case because EASI has submitted no affidavits of any kind. As noted above, Defendants believe that unless EASI has some competent evidence to contest Xcentric's proof that it did not author any statements about EASI, discovery would be futile and patently unfair to Xcentric. The current record reveals no legitimate factual disputes which require the court's resolution.

This is essentially the converse of what happened in *Theunissen*. There, the parties did supply conflicting affidavits, but the trial Court resolved the defendant's Motion to Dismiss based solely on those affidavits without additional discovery or an evidentiary hearing. The Sixth Circuit reversed, noting that **in the face of conflicting affidavits** from both plaintiff and defendant, the district court should have held a hearing to resolve the conflicting facts; "Deciding the issue upon the affidavits as he did, the district judge was obligated to examine each of these factual allegations notwithstanding [Defendant's] contrary assertions." *Id*. at 1459.

Here, because there are no affidavits (???) from EASI for the Court to consider, there is simply no present factual dispute to resolve, whether via evidentiary hearing or through additional jurisdictional discovery. Unless and until EASI supplies competent evidence of any disputed fact, the record before this Court does not establish any need for further discovery and

EASI's motion should be denied without requiring Xcentric to respond to discovery in a forum that has no jurisdiction over it.

V. CONCLUSION

For the reasons stated herein, Defendant Xcentric Ventures, L.L.C. respectfully requests that the Court deny Plaintiff's motion for jurisdictional discovery.

Dated: May 4, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing document was made via electronic mail using the Electronic Filing System upon the following:

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Dated: May 4, 2007 By: /s/ Talmage M. Watts